Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
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Review of the Commission's Regulations Governing Television Broadcasting	)	MM Docket No. 91-221
	)	
Television Satellite Stations Review of Policy and Rules	)	MM Docket No. 87-8
	)	
Review of the Commission's Regulations Governing Attribution of Broadcast Interests	)	MM Docket No. 94-150

To: The Commission

REPLY COMMENTS OF SMITH BROADCASTING GROUP, INC.

Smith Broadcasting Group, Inc. ("Smith"), by its attorneys, submits the following Reply Comments in response to the Commission's Further Notice of Proposed Rule Making, FCC 94-322 (rel. Jan. 17, 1995) ("Further Notice") and Notice of Proposed Rule Making, FCC 94-324 (rel. Jan. 12, 1995) ("NPRM") in the above-captioned proceedings. Smith and its principal control the licensees of the following stations: KEYT-TV, Santa Barbara, California; WETM-TV, Elmira, New York; WKTV, Utica, New York; WATM-TV, Altoona, Pennsylvania; and WWCP-TV, Johnstown, Pennsylvania.

Smith has a strong interest in the proposed changes in the local ownership rule and the attribution of broadcast interests. With respect to these issues, Smith urges the Commission to take the following actions:

- eliminate the contour overlap restrictions for television stations located in different Designated Market Areas ("DMAs");
- permit VHF/UHF and UHF/UHF combinations in all markets; and
- relax the broadcast attribution rules to consider only controlling interests in licensees.

I. Broadcasters Should Be Able To Own Two Television Stations With Overlapping Grade A or B Contours If The Stations Are Located In Different Markets.

The Commission's current duopoly rule prohibits common ownership of broadcast television stations whose Grade B signal contours overlap. 47 C.F.R. § 73.3555(b). This restriction was intended to encourage competition and programming diversity, which the Commission feared would suffer if one broadcaster were allowed to own more than one television station in the same community. Further Notice at ¶ 4. However, the Commission has recognized that changes in the video marketplace may warrant some relaxation of the rules designed to promote its goals of competition and diversity. Accordingly, the Commission has proposed to modify the Grade B overlap rule so that common ownership will be precluded only where there is an overlap of the Grade A contours. Id. at 117.

As the Commission notes, commercial broadcast station licensees now compete not only with each other but also with a variety of other programmers and video distribution outlets, including cable programmers and operators, telephone companies, video dialtone providers, wireless cable operators and DBS operators. Further Notice at ¶ 106. This growth in competition requires the Commission to balance the promotion of competition and diversity among broadcasters with the need to ensure that broadcasters may compete effectively against other types of video distributors. If this balance is not struck correctly, overall competition and diversity of programming will suffer.

The existing Grade B contour overlap rule fails to strike this important balance. On the one hand, the rule denies broadcasters the opportunity to achieve economies in local program production, as well as administrative and overhead expenses, personnel and sales. 1/ Broadcasters, especially small station group owners, need the benefit of such economies to compete against cable companies and other video distributors, which have seized economies of their own through "clustering" of their systems and through other methods of cost sharing.

On the other hand, the rule, as currently formulated, does little to promote competition and diversity where two stations with overlapping Grade A or B contours are, nonetheless, in different local markets. In these situations, the stations simply do not compete with one another -- whether for programming,

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1/ The Association of Independent Television Stations, Inc.'s ("INTV's") claim that relaxing the Grade B contour overlap restriction will not lead to cost savings is without merit. See Comments of INTV, MM Docket Nos. 91-221 & 87-8, at 31. While some overhead and operational costs will still have to be duplicated if two commonly-owned stations must operate in different markets, other significant costs will be shared.

advertising or viewership. 2/ Thus, common ownership of the stations would not deny programmers, advertisers or viewers broadcast alternatives. 3/ Indeed, preventing common ownership of two such stations disadvantages the stations relative to cable and other video distributors and programmers who can take advantage of cost-sharing efficiencies such that it may undermine the ability of the stations to obtain high-quality programming or produce local programming.

A good example of the lack of competition between stations in different markets, despite the overlap of the stations' Grade A and B contours, exists in the Commission's own backyard. Because of the way in which advertising is purchased and programming is sold, and because of viewer interests, television stations located in Washington, D.C. simply do not compete with television stations located in Baltimore, Maryland, for advertising dollars, programming purchases or viewers, even though the stations' Grade A contours overlap. This situation replays itself in many parts of the country where the markets are farther apart than the

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2/ Stations with overlapping Grade B contours can be in different markets because Grade B contours are generally considered poor proxies for local markets. See Further Notice at ¶ 117; Television Operators Caucus, Inc., Statement: Television Broadcast Policy, MM Docket Nos. 91-221 & 87-8, at 4; Comments of Post-Newsweek Stations, Inc., MM Docket Nos. 91-221 & 87-8, at 6. Competition for advertising, programming and network affiliation generally centers around Nielsen's Designated Market Areas (DMAs) rather than stations' Grade B contours. See Comments of Capital Cities/ABC, Inc., MM Docket Nos. 91-221 & 87-8, at 21.

3/ The Commission already has recognized in the context of requests for waiver of the duopoly rule that common ownership of two stations in separate markets, which have overlapping Grade B contours, will not adversely effect diversity by permitting stations to exercise an inordinate influence on public opinion or to achieve undue concentration of economic power. Capital Cities Communications, Inc., 59 R.R.2d 451, 465 (1985); Taft Broadcasting Partners Limited Partnership, 7 FCC Rcd 2854, 2855 (1992).

Washington, DC and Baltimore markets. However, merely changing to a Grade A overlap restriction will not address all situations of this type.

Consequently, Smith urges the Commission to remove contour-based restrictions on common ownership of television stations where the two stations in question are not in the same DMA. This approach would bolster the competitive position of broadcasters in the burgeoning video marketplace without endangering the Commission's competition and diversity goals.

II. VHF/UHF and UHF/UHF Combinations Should Be Allowed In The Same Market, Regardless Of The Market's Size.

Likewise, relaxing the Commission's duopoly rule to allow common ownership of two television stations in the same market -- provided that at least one is a UHF station -- would afford UHF broadcasters efficiencies that would allow them to compete effectively against other video distribution outlets without reducing competition and diversity. The Commission has long recognized the disadvantage UHF stations face in competing against VHF stations as a result of the poorer signal coverage of UHF stations. Further Notice at ¶ 119. While this problem has been ameliorated in some respects by the advent of cable retransmission of UHF stations, 4/ the UHF handicap remains significant, especially for UHF stations that have no network affiliation or that cannot share

4/ Of course, there also is persuasive evidence that UHF stations have fared poorly even as cable and other methods of retransmission have created opportunities to extend the reach of UHF signals. See Comments of Association of Independent Television Stations, Inc., MM Docket Nos. 91-221 & 87-8, at 24-29 (describing data showing recent declines in viability of UHF stations and noting the difficulty that many UHF stations have had in qualifying for "must carry" retransmission).

costs with other, commonly-owned stations. Further, advanced technologies that might erase the disparity between UHF and VHF signal quality may not be widely available for some time. 5/ Thus, many UHF stations will continue to face difficulties remaining competitively viable -- a situation worsened by intensifying competition from cable companies and other video distributors.

As in the context of stations with overlapping Grade A or B contours, UHF stations would reap substantial benefits by combining with another UHF station or with a VHF station. Such combinations would allow the stations to achieve economies in the production of local programming, as well as in administrative and other expenses. These economies, in turn, would strengthen the competitive position of UHF stations against stronger VHF stations and other video programmers and distributors such as cable operators. Moreover, given the comparative weakness of UHF stations, allowing UHF/UHF and UHF/VHF combinations would not hinder the Commission's pursuit of competition and diversity goals. To the contrary, these combinations would increase the quality and diversity of programming, including local programming, available in the market because stations enjoying the efficiencies described above could focus their attention and resources on programming.

For example, in a Commission-approved duopoly, Smith controls the licensee of UHF station WATM-TV, Altoona, Pennsylvania, and VHF station WWCP-TV, Johnstown, Pennsylvania, which are both assigned to the Johnstown-Altoona DMA.

5/ See generally Television Operators Caucus, Inc., Statement: Television Broadcast Policy, at 2.

Common ownership of these two stations has produced significant efficiencies. Without these efficiencies, it would be extremely difficult to provide the significant service that the communities now receive, including extensive local news programming and two network affiliations. Indeed, because of terrain factors and the size of the market, it was nearly impossible for the individual stations to provide adequate news coverage to the market before the Commission approved this duopoly.

In other markets, service to the public also would improve markedly as the result of common ownership of two UHF stations or a VHF and UHF station. Because of the Commission's allocation scheme, UHF broadcasters in a number of markets, such as the Harrisburg-Lancaster-Lebanon-York, Pennsylvania, market, where Smith previously controlled the licensee of UHF station WHTM-TV, are seriously disadvantaged with respect to the one VHF station assigned to the market. Since the dominating VHF station receives the bulk of advertising dollars and viewership, the programming efforts of the UHF stations suffer, as does the diversity of programming available in the market. However, if two UHF stations could combine in that market, they could compete much more effectively against the dominating VHF station or stations. Consequently, Smith urges the Commission to allow joint ownership of two stations in the same local market where one of the two is a UHF station.

If, as Smith urges, the Commission allows joint ownership of two UHF stations or a UHF and VHF station in the same market, it should consider LMAs to be attributable to the brokering station for purposes of the local ownership restrictions. Thus, a UHF licensee should be able to own or broker a second UHF station or a VHF station in the same market. However, if a party controls two stations in the market, it should not be permitted to broker a third station in the market.

III. The Attribution Rules Should Be Relaxed So As To Consider Only Controlling Interests.

As part of its review of the regulations governing broadcast attribution, the Commission has considered whether to expand attribution based on the degree of "influence" over a licensee. NPRM at ¶ 13. Smith respectfully urges the Commission to reject any such expansion as misguided.

Basing attribution policies on notions of influence rather than control is problematic for several reasons. First, attribution based on influence conflicts with the traditional treatment of ownership and attribution, which has focused primarily on control rather than influence. 6/ Second, the degree of potential influence of any particular investor is, at best, ambiguous, and turns on a variety of factors such as the availability of alternative debt sources, the financial strength of the licensee and the nature and extent of competition in the market. Consequently, attribution based on influence is likely to be arbitrary, thereby delaying transactions and discouraging investment. Third, the types of parties with influence over licensees

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6/ See, e.g., Reexamination of the Commission's Rules and Regulations Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities, FCC 83-46 (rel. Feb. 15, 1983), at ¶ 17; Review of the Commission's Regulations Governing Programming Practices of Broadcast Television Networks and Affiliates, MM Docket No. 95-92, at ¶ 6.

will vary from case to case, thus making it difficult for regulators to establish consistent and effective rules for measuring influence. Fourth, attribution based on influence creates opportunities for parties to exploit the ambiguity of the standard by bringing meritless actions against competing firms.

In light of these shortcomings, Smith urges the Commission to relax, rather than tighten, the attribution rules. Specifically, the Commission should look at control of the licensee rather than influence. Accordingly, the Commission should retain the single majority shareholder rule, 7/ non-voting stock should not be considered attributable, 8/ and limited partners should be treated like non-voting shareholders without the need for insulation measures.

CONCLUSION

For decades, the Commission has taken the lead in promoting competition and diversity in broadcast television. The Commission also has acted to protect the public's clear interest in keeping over-the-air commercial television free, universally available and locally-oriented. Smith asks only that the Commission adopt a balanced approach in carrying out these two responsibilities in light of the requirements of the new, more competitive and technologically diverse market for video distribution. The Commission may achieve such balance by: (1) allowing common ownership of two stations with overlapping contours if the stations are in different markets; (2) allowing VHF/UHF and UHF/UHF station combinations in

7/ 47 C.F.R § 73.3555 n.2(b).

8/ Id. at n.2(f)

any size market; and (3) relaxing the broadcast attribution rules to consider only control of the licensee.

Respectfully submitted,

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